BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WILLIAM RIDGEWAY	)	
Claimant	)	
	)	
VS.	)	
	)	
EXIDE TECHNOLOGIES	)	
Respondent	)	Docket No. 1,033,067
	)	
AND	)	
	)	
AMERICAN ZURICH INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the September 7, 2010 Review and Modification Award by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on November 19, 2010 in Wichita, Kansas. E. Lee Kinch, of Wichita, Kansas, was appointed by the Acting Director as a Pro Tem in this matter.[1]

APPEARANCES

Scott J. Mann, of Hutchinson, Kansas, appeared for the claimant. Jared T. Hiatt, of Salina, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Review and Modification Award. In addition, at oral argument the parties agreed that claimant has sustained a 100 percent wage loss and his fringe benefits ceased as of November 30, 2009, thus increasing his gross average weekly wage to $1,141.24. The respondent also conceded the only evidence contained within the record shows that claimant sustained a 93.1 percent task loss.

[1] This appointment was made due the retirement of Board Member Carol Foreman.

ISSUES

The ALJ found that claimant failed to sustain his burden of proving he is entitled to review and modification of his August 23, 2007 Award. The ALJ first concluded that claimant failed to establish that he suffered an increase in his functional impairment. He then went on to conclude that because claimant worked in an accommodated position earning a comparable wage following his injury, claimant retained his earning capacity. And under K.S.A. 44-528, he was not entitled to a modification of his earlier Award.

Claimant argues that he is entitled to review and modification because his functional impairment had increased and because the termination of his employment caused him to suffer an actual wage loss, which, under the *Bergstrom*[2] and *Tyler*[3] decisions, entitles him to an increase in his Award from his percentage of functional impairment to a work disability.

Respondent argues that the ALJ should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds that the ALJ's Review and Modification Award sets out findings of fact that are detailed, accurate, and supported by the record. The Board further finds that it is not necessary to repeat those findings in this order. Therefore, except as found herein the Appeals Board otherwise adopts the ALJ's factual findings as its own as if specifically set forth herein and will only refer to those facts as needed to explain the Board's legal conclusions and its ultimate ruling.

There is a single issue to be determined in this appeal. Specifically, whether claimant is entitled to a modification of his Agreed Award[4] due to respondent's decision to terminate claimant's employment on November 30, 2009. Since the date of his Agreed Award, claimant had been continuously employed by respondent in an accommodated position that paid him a comparable wage.[5] But in November 2009, respondent conducted

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[2] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

[3] *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 224 P.3d 1197 (2010).

[4] The Agreed Award was entered into on August 23, 2007.

[5] A comparable wage is "90 percent or more" of an injured claimant's pre-injury average weekly wage. See K.S.A. 44-510e(a).

an investigation into its employees' unauthorized computer usage. As a result, claimant, and a number of other employees, were terminated. In claimant's instance, he was terminated effective November 30, 2009. On January 22, 2010, he filed a request for Review and Modification.

An award may be modified when changed circumstances either increase or decrease the permanent partial general disability. The Workers Compensation Act provides, in part:

> Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.[6]

K.S.A. 44-528 permits modification of an award in order to conform to changed conditions.[7] If there is a change in the claimant's work disability, then the award is subject to review and modification.[8]

In a review and modification proceeding, the burden of establishing the changed conditions is on the party asserting them.[9] Our appellate courts have consistently held that there must be a change of circumstances, either in claimant's physical or employment status, to justify modification of an award.[10] The change does not have to be a change in claimant's physical condition. It could be an economic change, such as a claimant

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[6] K.S.A. 44-528.

[7] See *Nance v. Harvey County*, 263 Kan. 542, Syl. ¶ 1, 952 P.2d 411 (1997).

[8] See *Garrison v. Beech Aircraft Corp.*, 23 Kan App. 2d 221, 225, 929 P.2d 788 (1996).

[9] *Morris v. Kansas City Bd. of Public Util.*, 3 Kan App. 2d 527, 531, 598 P.2d 544 (1979).

[10] See, e.g., *Gile v. Associated Co.*, 223 Kan. 739, 576 P.2d 663 (1978); *Coffee v. Fleming Company, Inc.*, 199 Kan. 453, 430 P.2d 259 (1967).

returning to work at a comparable wage,[11] or losing a job because of a layoff.[12] The burden of establishing the changed conditions is on the party asserting them.[13]

The ALJ denied claimant's request for an increase in his permanent impairment and did so based on two different reasonings. First, he concluded that claimant had failed to establish that he sustained any *additional* impairment as a result of his underlying injury. In denying this request, the ALJ reasoned as follows:

> Dr. Brown rated [c]laimant at a 35% impairment of function to the body as a whole. Dr. Brown did **not** indicate that [c]laimant's functional impairment had increased since the original Award. Dr. Brown did indicate that he did not agree with Dr. Amundson's rating, that doctors' opinions on rating "frequently don't coincide." Dr. Brown also expressed the belief that [c]laimant would have continued to improve in his functional impairment and physical abilities, because he "continued to work successfully" after the original rating. **Claimant has failed to sustain his burden of proof of having suffered an increase in his functional impairment after the date of the original Award.**[14] (emphasis supplied).

Claimant maintains that Dr. Brown substantiates the fact that his impairment exceeds the initial 24 percent impairment that was provided for in the original Agreed Award.

After considering the entirety of the evidence, the Board, like the ALJ, remains unpersuaded that claimant's functional permanent impairment has increased since the date his original Agreed Award was entered into. As noted by the ALJ, there is nothing within Dr. Brown's testimony that indicates claimant's condition has worsened and his permanent impairment had *increased* since August 23, 2007. And even Dr. Brown acknowledges that "doctors' opinions frequently don't coincide."[15] And under these facts and circumstances, the Board is not persuaded by his opinions. Thus, based upon this evidence, the Board finds the ALJ's conclusions as to claimant's failure to establish an increase in his permanent impairment should be affirmed.

The second basis for the ALJ's decision is more troublesome. The ALJ concluded that earlier precedents were not on point and, therefore, not binding and that in his view, the plain language of K.S.A. 44-528(b) "requires the court to consider the claimant's

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[11] See *Ruddick v. Boeing Co.*, 263 Kan. 494, 949 P.2d 1132 (1997).

[12] See *Lee v. Boeing Co.*, 21 Kan. App. 2d 365, 372, 899 P.2d 516 (1995).

[13] See *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979).

[14] ALJ Award (Sept. 7, 2010) at 5.

[15] Brown Depo, p 4.

capacity to earn comparable wages in a review and modification proceeding."[16] That statute reads, in pertinent part, as follows:

> If the administrative law judge finds that the employee has returned to work for the same employer in whose employ the employee was injured or for another employer and is earning or is capable of earning the same or higher wages than the employee did at the time of the accident, or is capable of gaining an income from any trade or employment which is equal to or greater than the wages the employee was earning at the time of the accident . . . the administrative law judge **may** modify the award and reduce compensation or may cancel the award and end the compensation.[17] (emphasis added).

The ALJ acknowledged that the Kansas Supreme Court, in *Bergstrom*[18] , requires the fact finder to follow and apply the plain language of K.S.A. 44-510e which dictates that a post-injury wage loss must be based upon the actual average weekly wage claimant earned while working as compared to the average weekly wage claimant is earning after the injury. Indeed, the Board has followed this line of reasoning in recent cases, including review and modification requests.[19] In looking at the resulting wage loss, *Bergstrom* and even more recently *Tyler*[20] do not compel the fact-finder to ask *why* the injured individual lost his or her job. It merely calculates the loss and applies the resulting number. This approach has recently been reaffirmed by the Court of Appeals in *Lewis*[21], a case that involved a request for review and modification.

In *Lewis*, just as here, the claimant sought a review and modification of his 2003 earlier award based upon his termination in April 2007. In *Lewis*, the Court of Appeals affirmed the Board's decision to grant that claimant's request for an increase in his award without regard to the presence or lack of a "nexus" between the Lewis's injury and his wage loss. The *Lewis* Court explained its reasoning as follows:

> Sun Graphics acknowledges that this court recently decided this issue adversely to its position in *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App.2d 386, 224

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[16] *Id.* at 6.

[17] K.S.A. 44-528(b).

[18] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

[19] See *Reyes v. Centimark Corporation*, No. 1,007,295, 2010 WL 1445590, (Kan. WCAB Mar. 08, 2010); *Serratos v. Cessna Aircraft Company*, No. 1,024,584, 2010 WL 1445593 (Kan. WCAB Mar. 25, 2010), petition for judicial review filed Apr. 6, 2010.

[20] *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 224 P.3d 1197 (2010).

[21] *Lewis v. Sun Graphics, Inc.*, No. 103,277, 2010 WL 3564802, 237 P.3d 1272 (Unpublished Court of Appeals Decision September 03, 2010).

> P.3d 1197 (2010). In *Tyler*, this court held that absent a specific statutory provision requiring a nexus between the wage loss and the injury, this court will not read such a requirement into K.S.A. 44-510e for recovery of permanent partial general disability awards. 43 Kan. App.2d at 391. We decline to depart from this court's holding in *Tyler* that there is no statutory provision requiring a nexus between the wage loss and the injury for recovery of permanent partial general disability awards.[22] (Citations omitted)

The ALJ did not find that these legal precedents applied to the instant facts. Rather, he concluded that:

> **K.S.A. 44-528(b)** expressly requires the court to consider the claimant's capacity to earn comparable wages in a review and modification proceeding. It does not limit the court's inquiry to a determination of a claimant's actual earnings. While the court is not permitted to consider a cliamant's capacity to earn wages in entering an original Award of compensation, the legislature has adopted a different standard for a review and modification proceeding. This court will not speculate on the legislature's intent in adopting a different standard for review and modification proceedings, and will not read into the statute to either add a requirement for a simple comparison of pre-injury and post-injury earnings, **or** to remove the requirement that the court consider the claimant's capacity to earn comparable wages.[23]

Thus, the ALJ believed that he need only look to K.S.A. 44-528 to determine whether claimant had the capacity to earn the same or more as he had before the injury. And because claimant had been working and earning his same (or more) wages, he was not entitled to any increase in his Award after his employment ended.

Respondent asks us to affirm the ALJ's analysis and decline to increase claimant's Award. Conversely, claimant respectfully suggests the ALJ's analysis is contrary to applicable precedent and should be reversed.

The Board has carefully reviewed the parties' briefs along with the ALJ's Review and Modification Award and concludes that the ALJ's denial of claimant's request for an increase in his Award should be reversed.

First, K.S.A. 44-528(b) does not **require** the court to consider claimant's capacity to earn wages. The statute utilizes the word "may" and gives the finder of fact the discretion of increasing or decreasing the award. So, even if K.S.A. 44-528(b) applied, the

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[22] *Id.* at 4.

[23] ALJ Award (Sept. 7, 2010) at 6.

finder of fact has the discretion to determine whether and when an award is to be modified.

Moreover, the Board has previously concluded that the definition of permanent partial disability in K.S.A. 44-510e applies to pre and post-award determinations of permanent partial disability.[24] This precise question is one not yet definitely determined by the appellate courts in Kansas since the *Bergstrom* decision was issued. We do know, however, that the Court of Appeals continues to follow the *Bergstrom* and *Tyler* rationales even in the context of a review and modification proceedings. And the Kansas Court of Appeals, as affirmed by the Kansas Supreme Court, did address the issue pre *Bergstrom*. In *Asay*[25], the Court was asked to determine if the language in K. S. A. 44-528 dealing with an employee's capability to earn the same or higher wages altered the test for determining compensable permanent partial general disability under K. S. A. 44-510e. The Court was comparing the claimant's ability to engage in work of the same type and character that he was performing at the time of his injury (the then effective test for work disability) to the language of .K S. A. 44-528. The Court determined that the language of K. S. A. 44-528 did not justify cancellation of an award unless the claimant had regained the "ability . . . to engage in work of the same type and character that he was performing at the time of his injury."[26] The Court also determined that the language of K. S. A. 44-510e, which had been modified in 1974, trumped the older language in K. S. A. 44-528, ruling that "where there is a conflict between two statutes which cannot be harmonized, the later legislative expression controls."[27]

The Board finds that K.S.A. 44-510e controls in this matter over the general language in K.S.A. 44-528 and reflects the legislature's most recent expression of its intent on how permanent partial general (work) disability awards are to be computed. This conclusion is reinforced by the *Tyler* and now the *Lewis* decisions. Thus, the test is claimant's actual wage earnings, post award, and not his capacity to earn the same or higher wages.

The dissent attached to this decision would adopt the ALJ's analysis, arguing that the language of K.S.A. 44-528 differs from the language of K.S.A. 44-510e and therefore the capacity test in K.S.A. 44-528 should be followed post-award. Thus, that member would affirm the ALJ's Review and Modification Award in its entirety.

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[24] *Ramey v. Cessna Aircraft Company*, No. 5,018,001, 2010 WL 3489664 (Kan. WCAB Aug. 11, 2010); *Serratos v. Cessna Aircraft Company*, No. 1,024,584, 2010 WL 1445593 (Kan. WCAB Mar. 25, 2010.) Serratos is currently on Appeal with the Court of Appeals..

[25] *Asay v. American Drywall,* 11 Kan. App.2d 122, 715 P.2d 421 (1986).

[26] *Id.* at Syl ¶ 4.

[27] *Id.* at 126.

It is worth noting that the ALJ's and dissent's interpretation of K.S.A. 44-528 analysis would, in effect, cause inconsistent and illogical results. For example, under that interpretation, an injured employee who returned to work (at an accommodated position) and thereafter entered into an agreed award but was later terminated would not be entitled to an increase in his permanent partial general (work) disability under K.S.A 44-510e(a), but would be limited to benefits already received because, as here, he had demonstrated a "capacity to earn the same or higher" wages. In contrast, a similarly situated worker who was injured but had yet to receive any award (agreed or otherwise) but was terminated would unquestioningly be subject to the analysis provided for in K.S.A. 44-510e(a). His work disability would be based upon an average of his actual wage loss and task loss without regard to his or her capacity to earn wages. Thus, similarly situated claimants would receive potentially greatly differing results based solely upon the timing of the disposition of their claims.

Such a vast financial difference in the outcome might well give inappropriate incentive to employers to terminate an employee's employment immediately after an award is issued and in turn, apply for review and modification under K.S.A. 44-528 to take advantage of the different wage loss analysis. This would be against the stated purpose of the Workers Compensation Act, namely to return employees to work at a comparable wage.[28]

In sum, in a review and modification proceeding the claimant's permanent partial disability may be reviewed and modified by applying the definition of permanent partial disability contained in K.S.A. 44-510e. When claimant is no longer earning 90 percent or more of his preinjury average weekly wage that statute requires the actual wage loss and task loss be averaged, with the numerical result being the work disability. Here, the only evidence is that claimant bears a 93.1 percent task loss. And when that figure is averaged with a 100 percent wage loss the result is a work disability of 96.55 percent effective November 30, 2009. Thus, the ALJ's Review and Modification Award is reversed and claimant's Award is hereby modified to reflect a permanent partial general (work) disability of 96.55 percent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Review and Modification Award of Administrative Law Judge Bruce E. Moore dated September 7, 2010, is affirmed in part and reversed in part as follows:

The claimant is entitled to 26.14 weeks of temporary total disability compensation at the rate of $467.00 per week or $12,207.38, followed by 96.93 weeks of permanent partial disability compensation at the rate of $467.00 per week or $45,266.31 for a 24

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[28] *Farrell v. U.S.D. No. 229*, 26 Kan. App.2d 797, 995 P.2d 881 (1999).

percent functional impairment, followed by permanent partial disability compensation at a rate of $467.00 per week not to exceed $100,000 for a 96.55 percent work disability.

As of December 30, 2010, there would be due and owing 26.14 weeks of temporary total disability compensation at the rate of $467.00 per week in the sum of $12,207.38, followed by 153.50 weeks of permanent partial disability compensation at the rate of $467.00 per week in the sum of $71,684.50 for a total due and owing of $83,891.88. Thereafter, the remaining balance in the amount of $16,108.12 shall be paid at the rate of $467.00 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of December 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the award of the majority. K.S.A. 44-528 is specific in directing the method of determining whether a modification of an award is proper. The statute requires a determination of an employee's capability to earn equal or greater wages than that being earned at the time of the accident. The Supreme Court, in an opinion which sent shock waves through the workers compensation bar in Kansas, was very specific in *Bergstrom*[29] in determining that the Court's obligation is to give effect only to express statutory language, rather than speculating on what the law should or should not be. The Court of Appeals, more recently, when discussing *Bergstrom* in *Tyler*[30], noted

[29] *Bergstrom,* supra.

[30] *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 224 P.3d 1197 (2010).

that judicial notions regarding the legislature's intent in the enactment of K.S.A. 44-510e(a) are not favored. The Court in *Tyler* went on to warn that "[j]udicial blacksmithing will be rejected even if such judicial interpretations have been judicially implied to further the perceived legislative intent."[31]

The judicial intent contained in K.S.A. 44-528 requires a determination as to whether a claimant is capable of earning the same or higher wages as those being earned on the date of accident. Here, claimant has the ability to return to an accommodated job with respondent, earning the same wages and receiving the same fringe benefits. The only thing preventing this result is the termination due to claimant's inappropriate activities while on his job with respondent. Claimant's earning "capability" is not in dispute with regard to his accommodated job with respondent. In this instance, claimant had returned to work with respondent earning a comparable wage.

Even under *Asay*[32] cited by the majority, this claimant retains the "ability . . . to engage in work of the same type and character that he was performing at the time of his injury."[33] Additionally, the version of K.S.A. 44-510e in effect at the time of the *Asay* decision is decidedly different from the current version of the statute. In 1986, the legislative mandate was to determine "the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced...". In 1993, this language was changed to the current version requiring an average of the wage loss and task loss suffered by the employee. This represented a major modification of K.S.A. 44-510e. Of note, K.S.A. 44-528 was also modified in 1993 to allow a determination by the "ALJ", rather than the director, of the employees capacity to earn the same or higher wages than the employee did at the time of the accident. The specific language regarding the employee's ability to earn the same or greater wages with either the respondent at the time of the accident, or from any trade or employment, was allowed to remain. Had the legislature intended for K.S.A. 44-510e to "trump" K.S.A. 44-528, the perfect time to do so would have been with the 1993 modifications of both statutes. The fact that the legislature allowed the language in K.S.A. 44-528 to remain should send a strong signal to the courts of Kansas as to it's "intent".

Additionally, in *Asay*, the court was proceeding under the old standard of the liberal construction of the Workers' Compensation Act to award compensation where it is reasonably possible to do so. That case law standard was changed by the legislature in 1987 to require a liberal construction of the statute to bring employers and employees

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[31] *Id.*, at 391.

[32] *Asay*, *supra*.

[33] *Id.*, at Syl. ¶ 4.

within the provisions of the workers compensation act, but to then apply the provisions of the act impartially to both.[34]

The majority also cites *Lewis* in support of it's position. However, *Lewis* deals with the question of a "nexus" between the injury and the wage loss. K.S.A. 44-528 involves no such issue. That statute only considers the capacity of the employee to earn equal or greater wages than what was being earned at the time of the accident.

The majority cites *Bergstrom* in support of it's position that the plain language of K.S.A. 44-510e outweighs that of K.S.A. 44-528. The Supreme Court, in *Bergstrom* identifies, as a "most fundamental rule of statutory construction" the intent of the legislature governs if that intent can be ascertained.[35] Here, the specific language of K.S.A. 44-528 is clear. It has been allowed to remain intact for decades, while K.S.A. 44-501e has been modified multiple times. It is hard to imagine a more clear legislative intent.

The majority argues that the dissent's requested result would result in an inequitable treatment of workers who suffer a job loss before an award versus after an award has been entered. The possibility of differing results with similarly situated claimants may be the result, with that outcome being arguably inappropriate. The fact that a legislatively created statute may result in inappropriate or even ludicrous results is not controlling. In *Saylor v Westar Energy*, Inc.[36], the Kansas Court of Appeals allowed a date of accident, determined under K.S.A. 44-508(d), to occur while an injured claimant was home recuperating from knee surgery. How inappropriate to allow a date of accident to occur weeks or even months after an employee ends his or her employment. Never-the-less, that is exactly the result with K.S.A. 44-508(d) and the new date of accident determinations when dealing with micro-trauma injuries. The change from the original bright-line rule of the last day worked[37] to the express language of K.S.A. 44-508(d) creates a presumption that the legislature intended to change the date of injury determination. As noted in *Saylor*, legislative intent as expressed in the language of the statute controls. In this instance, the legislature's determination that the language of K.S.A. 44-528 should remain unchanged displays it's clear intent.

Finally, the majority argues that K.S.A. 44-528 says "may" rather than shall in discussing the power of the ALJ to modify an award. This Board Member agrees that the statute says "may". However, under the analysis of the majority, the end result would not be "may", but would, instead, be "never".

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[34] K.S.A. 44-501(g).

[35] *Bergstrom* at 607.

[36] *Saylor v Westar Energy, Inc,* 41 Kan. App.2d 1042, 207 P.3d 275 (2009).

[37] *Kimbrough v University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003).

The very specific language of K.S.A. 44-528 should apply to this matter and claimant should be found to have retained the capacity to earn the same or higher wages as were being earned at the time of the accident. Claimant should be limited to his functional impairment pursuant to K.S.A. 44-528 and denied additional permanent partial general disability under K.S.A. 44-510e.

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BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
Jared Hiatt, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge